Editor's note: Distinguished by Curtis Wheeler, 62 IBLA 384 (March 24, 1982)

REPUBLIC OIL AND MINING CO.
AND
MARGARET V. COOMBS

IBLA 78-295 Decided May 26, 1978

Appeal from decision of the Utah State Office, Bureau of Land Management, rejecting oil and gas offer U 38899.

Affirmed.

1. Act of May 21, 1930 -- Oil and Gas Leases: Lands Subject to -- Rights-of-Way: Generally

   An oil and gas lease offer for lands in a reservoir right-of-way is properly rejected pursuant to the Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1970), and 43 CFR 3100.0-3(d)(1) which limit the right to lease deposits of oil and gas in and under rights-of-way to the owner of the right-of-way or his assignees.

2. Administrative Practice -- Notice: Generally -- Oil and Gas Leases: Right-of-Way Leases -- Rights-of-way: Generally

   Where the official records of the Bureau of Land Management show a reservoir right-of-way affecting certain land, the oil and gas therein may not be leased under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq. (1970). This result follows even though the reservoir right-of-way may have been issued improperly or should have been terminated. Martin Judge, 49 L.D. 171 (1972), followed.

APPEARANCES: Al T. Hays, President, Republic Oil & Mining Co.;
Margaret V. Coombs, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This is an appeal from a decision dated February 7, 1978, of the Utah State Office, Bureau of Land Management (BLM), rejecting noncompetitive oil and gas lease offer U 38899 for the following reasons:

> Parts of the lands are included in Reservoir Right-of-Way U-7737. The right to lease deposits of oil and gas in and under railroad and other rights-of-way is restricted to the owner of the right-of-way, or his assignees. 43 CFR 3100.0-3(d)(1). The remaining lands in the offer included less than 640 acres of available land.

The right-of-way referred to was granted on July 16, 1970, for solar evaporating ponds. The grantee had drilled shallow holes on the lands and had performed chemical analysis and laboratory work toward the development of its project. On May 14, 1975, pursuant to the grantees' request, BLM allotted the grantee a 4-year extension of time for furnishing proof of construction.

In their statement of reasons, appellants assert that a right-of-way was the incorrect instrument to grant the above-described surface use, and that BLM erred in extending the grantees' time for furnishing proof of construction. Appellants also contend that BLM failed to take into account the Department's multi-use policy which is directed toward permitting the simultaneous development of several resources on the same lands. 1/

[1] Where public lands have not been withdrawn from mineral leasing, they are ordinarily subject to oil and gas leasing in the discretion of, and under conditions imposed by the Secretary, Stanley M. Edwards, 24 IBLA 12, 83 I.D. 33 (1976). In the exercise of this discretion, ordinarily the BLM should make a determination whether leasing the lands with appropriate stipulations would be in the public interest. Fred P. Blume, 28 IBLA 58 (1976). See also Thomas F. Manera, 33 IBLA 362 (1978), where the Board directed BLM to make such a determination, according to the guidelines of 43 CFR 3100.4, prior to issuing a decision ruling on the viability of an

1/ 43 CFR 3100.4, entitled Multiple Development, provides:

"The granting of a permit or lease for the prospecting, development, or production of deposits of any one mineral will not preclude the issuance of other permits or leases for the same land for deposits of other minerals with suitable stipulations for simultaneous operation, nor the allowance of applicable entries, locations, or selections of leased lands with a reservation of the mineral deposits to the United States."

oil and gas lease offer. The case at bar, however, is controlled by the Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1970), and by the regulation cited in BLM's decision, 43 CFR 3100.0-3(d)(1), providing that leasing of oil and gas deposits in and under railroads and other rights-of-way acquired under any law of the United States is restricted to the owner of the right-of-way or his assignee. A. A. McGregor, 18 IBLA 74 (1974). Cf. R. S. McKnight, 72 I.D. 153 (1965).

[2] Appellants argue that a reservoir right-of-way is an "incorrect instrument form to grant this type of surface use," i.e., evaporation ponds, and that BLM extended the time for construction of facilities under the right-of-way grant without adequate justification.

Even assuming, arguendo, that these contentions are correct, the reflection of the reservoir right-of-way U7737 on the official records of the State Office is effective to bar any inconsistent disposition. See Frank M. Gallivan, A-27830 (February 4, 1959). See generally Robert L. Smith, 27107 (April 26, 1955), and Howard L. Grace, A-27026 (December 31, 1954).

The impact of an entry on the official records in a similar context was discussed by the Department in Joyce A. Cabot et al., 63 I.D. 122, 123 (1956), as follows:

> The Department has long followed the rule that offers for oil and gas leases filed for lands included in an outstanding lease must be rejected. Martin Judge, 49 L.D. 171 (1922); Sam Unruh, A-26803 (October 21, 1953). This rule applies either where the application is filed after the conflicting permit or lease has been canceled but before the notation of the cancellation has been made on the tract books or where the application is filed prior to the cancellation or relinquishment of the outstanding lease. E. A. Vaughey, 63 I.D. 85 (1956); Monson v. Sawyer, 50 L.D. 395 (1924); Sam Unruh, supra; George B. Friden, A-26402 (October 8, 1952).
>
> The appellants, however, contend that if the conflicting leases are held as part of a fraudulent scheme to violate the acreage limitations, the leases are void ab initio and the rule should not apply because a void lease cannot have a segregative effect.
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> In Hodges v. Colcord, 193 U.S. 192 (1904), the Supreme Court, in considering the segregative effect of a void entry, held that a prima facie valid entry, though void and ineffectual to vest any rights in the

> entryman, segregates the land from the public domain and prevents the initiation of rights by another person until it has been set aside and removed from the records of the land office.
>
> In similar situations arising under the coal land entry laws (30 U.S.C., 1952 ed., sec. 71 et seq.) the Department has held that despite the fact that entries were made by applicants who conspired to evade the acreage limitations of the law, the entries segregated the land they covered from other filing until their cancellation was noted on the tract books. Hiram M. Hamilton, 38 L.D. 597 (1910); cf. Thorne et al. v. Kirpatrick et al., 47 L.D. 219 (1919).
>
> Therefore, in the circumstances of this case, whether the outstanding leases are void or voidable, as far as the appellants are concerned, they are outstanding on the tract books and are of sufficient force to bring the Judge rule into play.
>
> Finally, the appellants urged that the rule ought not to be followed in a case in which the outstanding lease was improperly obtained and that to refuse to follow it in such circumstances would provide an effective means of enforcement of the Mineral Leasing Act.
>
> Early in the administration of the Mineral Leasing Act, the Department considered the problem of whether an application accompanied by a protest against an outstanding permit which ultimately results in its cancellation is excepted from the operation of the Judge rule or gains a preferred status. The Department decided that the rule applied and that such an application acquired no preference right. Stahl v. Stiffler, 49 L.D. 406 (1923); State of New Mexico v. Weed, 49 L.D. 580 (1923). While the Department will avail itself of the assistance of citizens in the disposal of public lands, it has determined that it will not grant a preference right to an applicant who furnishes the information leading to the cancellation of an oil and gas lease. [Footnotes omitted.]

It necessarily follows that even if it were established that a reservoir right-of-way was not the proper vehicle to authorize evaporation ponds on the public lands or that the time for construction of the improvements was extended without authority of law, the

continued notation of the reservoir right-of-way on the records is sufficient to preclude the issuance of an oil and gas lease for such lands under the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 et seq. (1970). We find that appellants' offer was properly rejected in view of the foregoing and the 640-acre rule. 2/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Joseph W. Goss
Administrative Judge

2/ 43 CFR 3110.1-3(a) states in applicable portion as follows:

"No offer may be made for less than 640 acres except where the offer is accompanied by a showing that the lands are in an approved unit * * * or where the land is surrounded by lands not available for leasing under the Act."